

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
TCE CONSTRUCTION, INC.)	
d/b/a NORTH POINTE LIQUOR STORE)	PERMIT NO. DL83-23194
104 WEST WASHINGTON)	
FAIRVIEW PARK, INDIANA 47842)	
)	
Applicant.)	

**PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. BACKGROUND OF THE CASE

TCE Construction, Inc., d/b/a North Pointe Liquor Store, 104 West Washington, Fairview Park, Indiana 47842, permit number DL83-23194 (“Applicant”), is the applicant for a type 217¹ Alcohol and Tobacco Commission (“Commission”) permit. The application was assigned to the Alcoholic Beverage Board of Vermillion County (“Local Board”). The Local Board held a hearing on June 14, 2007, and voted four (4) to zero (0) with respect to this permit. On July 3, 2007, the Commission voted to adopt the recommendation of the Local Board and approve the application at its regularly held meeting.

On or about July 12, 2007, Remonstrator Elmo Hills filed a Remonstrator’s Objection, Petition for Intervention and a Request for Appeal Hearing which was subsequently granted on July 30, 2007. On or about July 26, 2007, Remonstrator Larry Snyder filed a Petition for Intervention (“Snyder Petition”) which was subsequently granted on July 31, 2007. The matter was assigned to the Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on September 26, 2007, and at that time, witnesses were sworn, evidence

¹ Liquor, beer and wine dealer located in an incorporated area.

was heard, and the matter was taken under advisement. The Hearing judge also took judicial notice of the entire contents of the file related to this cause. Having been duly advised of the facts and law at issue, the Hearing Judge now submits these Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
1. William Wyres, Applicant;
 2. Michael Kelley, business partner of Applicant;
 3. Linda Kelley, wife of Applicant's business partner; and,
 4. Thomas Gosnell, friend and character witness of Applicant.
- B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
1. Exhibit 1 – *Summary*, “Points of Interest”;
 2. Exhibit 2 – Photographs of the proposed permit premises;
 3. Exhibit 3 - Petitions in support of the Applicant consisting of adjoining property owners and residents within a three (3) or four (4) block radius containing one hundred forty three (143) signatures;
 4. Exhibit 4 – letter of support from Thomas Klotz, neighboring property owner of proposed permit premises; and,
 5. Exhibit 5 – Certified Meeting Minutes, Fairview Park Town Council:
 - a. January 9, 2007;
 - b. February 13, 2007;
 - c. March 13, 2007; and,
 - d. April 10, 2007.
- C. The following individuals testified before the Local Board against the Applicant in this cause:
1. Elmo Hills, member of Victory Baptist Church;
 2. Sandee Frey, Elementary Counselor for Vermillion county schools;
 3. Marion Pastore, representative of Vermillion county local coordinating council; and,
 4. Elizabeth Chaney, Member of Victory Baptist Church and SADD sponsor at Vermilion Highschool; Greg Carter, a resident of Corydon, Indiana.

- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
1. Exhibit A – Photos of the proposed permit premises dated June 11, 2007;
 2. Exhibit B - Petitions objecting to issuance of the permit containing one hundred forty eight (148) signatures;
 3. Exhibit C – letter objecting to issuance of the permit from the Local Coordinating Council for a Drug Free Vermilion County dated May 3, 2007; and,
 4. Exhibit D – photos of playground area at Victory Baptist Church.

IV. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. William Wyres, Applicant; and,
2. Michael Kelley, business partner of Applicant.

- B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Exhibit 1 – Google map identifying the proposed permit premises;
2. Exhibit 2 – Architectural drawings, North Pointe Plaza;
3. Exhibit 3 – State form 41191 – *Construction Design Release* for proposed permit premises; and,
4. Exhibit 4 – photos of the proposed permit premises and neighboring properties.

- C. The following individuals testified before the Commission against the Applicant in this cause:

1. Larry Snyder, Senior Pastor of Victory Baptist Church; and,
2. Elmo Hills, member of Victory Baptist Church.

- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

5. Exhibit 1 – Application for new and transfer of permit, page one, with two hundred foot (200') rule highlighted;
6. Exhibit 2 – Ind. Code § 7.1-3-21-11, *Premises near wall of school or church*;
7. Exhibit 3 – five (5) photographs depicting the area surrounding Victory Baptist Church;
8. Exhibit 4 – Indiana Criminal Justice Institute, *Comprehensive Community Plan* for Vermillion County; and,
9. Exhibit 5 – Elmo Hill's statement to hearing judge.

V. FINDINGS OF FACT

1. TCE Construction, Inc., d/b/a North Pointe Liquor Store, 104 West Washington, Fairview Park, Indiana 47842, permit number DL83-23194, is the Applicant for a Type 217 permit. (ATC File).

2. Although the permit is not being placed within two hundred feet (200') of a church or school, Victory Baptist Church ("Church") is located within two hundred twenty two feet (222') of the proposed permit premises. (ATC File; Local Board Hearing).

3. Because of the relative close proximity, the Applicant met with representatives of the Church to notify them of the plan to operate a package liquor store at the proposed permit premises. (ATC Hearing).

4. The meeting with representatives of the Church took place prior to initiating construction on the proposed permit premises. (Local Board Hearing, ATC Hearing).

5. Upon hearing objections from the representatives of the Church, the Applicant offered to sell the real property constituting the proposed permit premises to the Church. (Local Board Hearing, ATC Hearing).

6. Additionally, the Applicant sought prior approval from the Indiana State Excise Police ("Excise") and the Town of Fairview prior to initiating construction on the proposed permit premises. (ATC Hearing).

7. On March 13, 2007, prior to commencing construction and applying for the Permit, the Fairview Park Town Council ("Town Council") considered the Applicant's plans. (Local Board Hearing, ATC Hearing).

8. Members of the Church attended the Town Council meeting and expressed opposition to the plans. (Local Board Hearing, ATC Hearing).

9. Over the objections raised at the Town Council meeting, the Applicant's plans were approved. (Local Board Hearing, ATC Hearing).

10. The Applicant meets the qualifications to hold a permit pursuant to Ind. Code § 7.1-3-4-2, Ind. Code § 7.1-3-5-2, Ind. Code § 7.1-3-10-2 and Ind. Code § 7.1-3-15-2. (Local Board Hearing; ATC Hearing).

11. The permit is being placed in a commercial location and is not being placed in a residential district as referred to in Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1. (ATC File; ATC Hearing).

12. The Applicant is of good moral character and of good repute in the community as required by 905 IAC 1-27-1. (Local Board Hearing; ATC Hearing).

13. The Applicant's employees are extensively trained to address issues such as sales to minors, sales to intoxicated patrons and compliance with Commission laws and rules. (Local Board Hearing, ATC Hearing).

14. Applicant shall require Excise sponsored training for all employees. (ATC Hearing).

15. The proposed permit premises will have four (4) operational security cameras covering the front, sides and back of the store. (ATC Hearing).

16. The town of Fairview designated the North Pointe Plaza areas as an Economic Revitalization Target Area; as such, Applicant received a tax abatement from the town. (ATC Hearing).

17. The proposed permit premises is situated on a four (4) lane highway that is considered a main thoroughfare. (ATC Hearing).

18. There is a convenience store holding an alcoholic beverage permit directly behind the church and directly across the street from the high school. (ATC Hearing).

19. The Local Board voted unanimously to approve issuance of the permit. (Local Board Hearing).

20. The weight of the evidence, which includes petitions submitted by the Applicant, testimony concerning customer inquiries, and the availability of Type 217 permits in Vermillion County, supports the Local Board conclusion that there is a need and desire in the Fairview community for the Applicant to obtain the permit. (Local Board Hearing; ATC Hearing).

21. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the

Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.

8. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).

9. The proposed permit premises are not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.

10. The proposed permit premises are more than 200 feet (200') from a church or school. (ATC File). Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.

11. The Applicant is not disqualified from holding a Commission liquor, beer and wine dealer permit. Ind. Code § 7.1-3-4-2; Ind. Code § 7.1-3-5-2, Ind. Code § 7.1-3-10-4 and Ind. Code § 7.1-3-15-2.

12. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

13. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

14. “Need” means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

15. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

16. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

17. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

18. There is a need for a liquor, beer and wine grocery dealer permit at the Applicant's location. 905 IAC 1-27-4 (a).

19. The neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b)

20. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 831 (Ind. App. 1982).

21. To deny the application to Applicant while granting other similarly situated applicants’ applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

22. The commission shall follow the recommendation of the Local Board unless the recommendation is (i) arbitrary and capricious; or (ii) unsupported by substantial evidence.

Ind. Code § 7.1-3-19-11.

23. The Local Board's recommendation was not clearly erroneous as it was supported by substantial evidence. *Id.*

24. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to recommend approval of the permit application of the Applicant in this matter was based on substantial evidence, not arbitrary and capricious, and shall be sustained. It is further Ordered, Adjudged and Decreed that that the evidence adduced at the ATC Hearing was in favor of the Applicant and against the Remonstrators. The appeal of remonstrators Elmo Hills and Larry Snyder are denied, the recommendation of the Local Board in this matter is sustained, and the permit applied for herein is hereby GRANTED.

DATE: November 26, 2007

U-Jung Choe, Hearing Judge